WHY THE STATE?

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We're back where we began. One hundred years ago the issue of the day was the scope of state power. America was becoming increasingly urbanized and industrialized and, to curb the excesses of industrial capitalism, various political forces turned to the state.[1] The Interstate Commerce Commission was established in 1887, as part of a larger program to regulate the railroads that was to include the Elkins Act of 1903, the Hepburn Act of 1906, and many state statutes; the Sherman Act was enacted in 1890, and the first peacetime income tax in 1894; statutes were also passed regulating the sale and distribution of liquor and lotteries; and a wide variety of federal and state statutes were then enacted to control various facets of the employment relationship, including the maximum number of hours worked, safety, child labor, and union membership.

These advances in the use of state power did not come easily. They were fought at almost every turn, and the forces of resistance found a sympathetic ear on the Supreme Court. Many of the measures were invalidated, while others were cabined by narrow constructions. Liberty was reduced to limited government. During the early part of the twentieth century, however, the balance of power began to shift and, by the time of the New Deal and World War II, state intervention in social and economic matters became a pervasive feature of national life. In our own day, the victory of the activist state was given dramatic expression in the civil rights movement of the early 1960s — the so-called Second Reconstruction — and in Lyndon Johnson's Great Society. State power then became the principal instrument for achieving a true and substantive equality.

In the late sixties, as our attention shifted to the Vietnam War and we began to feel the pressure of a spiraling inflation, things changed. An attack on "big government" became the organizing theme of our politics. It was voiced by both Democrats and Republicans, and over the next twenty years, a myriad of programs were proposed and sometimes instituted to limit domestic governmental activities, particularly those of the federal government. These programs went by the name of "the new federalism," "revenue sharing," "deregulation," "pri-

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[1] *See* Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1192 (1986).

vatization," "balancing the budget," and "alternative dispute resolution." Virtually all of the political leaders of the period partook in this assault on the activist state, but none more successfully than President Reagan. He has pushed for the recriminalization of abortion, but putting that issue to one side, he has managed to put the activist state on the defensive and called into question the principles taken as axiomatic for a generation or two. Today we find ourselves engaged in the same debates that dominated law and politics a century ago; only the burden of revision has changed. The issue is still the reach of state power, but the debate now takes place in a social context in which the activist state is part of the status quo.

In this debate, as in all the grand political struggles of American politics, the Constitution has played an important role. Critics of the activist state invoke the due process clause and its protection of liberty but with only limited success. It has given rise to a "right to privacy" and has been used to protect the right to an abortion, but only by the narrowest of margins. *Lochner v. New York*,[2] the 1905 decision that invalidated a state statute establishing a maximum work week, still operates as a negative example, as a reminder of all the dangers of substantive due process. There is, however, another branch of constitutional law that does not labor under this historical burden and that has long served as the breeding ground of libertarian sentiment. It is the first amendment.

As a protection of speech and other forms of political activity, the first amendment is more limited in its reach than substantive due process, which can be used as a bar to all manner of state regulation. But those intent on attacking state intervention have learned how to bring more and more activities within the protection of the first amendment; today it is even used to curb state regulation of commercial advertising. The first amendment also enjoys what substantive due process was never able to obtain, namely, a consensus — support from the entire political spectrum. Even as pressure mounted in the early part of this century for increased state intervention, a special place or exception was always reserved for speech. The progressives embraced Holmes's dissent in *Abrams v. United States*[3] and its plea for "free trade in ideas"[4] just as fervently as they did his dissent in *Lochner*. In fact, free speech achieved its first victories in the Supreme Court just when the Court began the process of overruling *Lochner* and legitimating the New Deal.

This peculiar status of free speech in our constitutional scheme, as the one plea for limited government that appears to be embraced by

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[2] 198 U.S. 45 (1905).

[3] 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

[4] *Id.* at 630.

all, has not gone unnoticed by free market theorists. As part of the contemporary assault on state activism that so dominates our politics, Ronald Coase and Aaron Director have confronted New Deal liberals with the free speech tradition in order to remind them of the virtues of laissez faire and to build a case against state intervention in economic matters.[5] My inclination is, of course, just the reverse. It occurred to me that if Coase and Director can celebrate the libertarian element in the free speech tradition as a way of arguing against state intervention in the economic sphere, we should be able to start at the other end — to begin with the fact of state intervention in economic matters, and then use that historical experience to understand why the state might have a role to play in furthering free speech values. Such an approach might not only clarify and enrich our understanding of the first amendment, but might also yield a more general and perhaps more important insight. It might undermine the larger assault on the state. Because speech has been used as a lever for laissez faire, on the theory that it identifies an area where the demand for limited government is strongest and most appealing, a conclusion that state regulation of speech is consistent with, and may even be required by, the first amendment might well throw the entire critique of the activist state into question.

This Essay focuses on the first amendment and the role of the state in furthering free speech values but is situated within a broader debate, as vibrant in 1987 as it was in 1887, about the role of the state in general, and it is meant to illuminate that larger issue as well. Far from what Director and Coase supposed, the first amendment does not supply considerations in favor of laissez faire, but rather points toward the necessity of the activist state.

I.

The Constitution is not a testamentary document that distributes to future generations pieces of property in the form of rights. Rather, it is a charter of governance that establishes the institutions of government and the norms, standards, and principles that are to control those institutions. The Bill of Rights assumes that the institutions of government have already been established and proceeds to make authoritative a set of social ideals or values. Adjudication is one process by which these abstract ideals are given concrete meaning and expression and are thereby translated into rights.

In the case of the equal protection clause, the taproot of modern law, this general picture of constitutional adjudication is now well

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[5] *See* Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. PROC. 384 (1974); Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1 (1964).

established, although we have also come to recognize that constitutional ideals are capable of various interpretations. There appears to be agreement on the purpose of the fourteenth amendment; it was intended to secure equality for the newly freed slaves and to give constitutional status to the ideal of racial equality. There has been disagreement, however, over the particular principles or rules that should be applied to realize this ideal. At first it seemed that a principle prohibiting discrimination and commanding color blindness would be appropriate. But during the Second Reconstruction, as we moved away from the problems of Jim Crow and began to confront more deeply entrenched forms of racism, we had second thoughts. A new principle seemed needed, one that could directly and immediately protect against the perpetuation or aggravation of caste structure. This new principle, which I have called "the group disadvantaging principle"[6] but which has come to be recognized under many different names, seeks to promote racial equality, as does the antidiscrimination principle, but understands racial equality in substantive rather than procedural terms. The group disadvantaging principle does not aim at guaranteeing color blindness, but rather seeks to end social subordination.

In the modern period, equal protection litigation can be seen as a struggle between these two mediating principles — between two conflicting visions of how the commitment to racial equality should be understood and how the ideal might be most effectively realized. In a number of cases the two principles have diverged, most notably when courts are asked to evaluate selection criteria (such as job tests) that appear neutral on their face but have an adverse impact on a disadvantaged group. Antidiscrimination permits such criteria, while the group disadvantaging principle tends to bar them. Furthermore, on some occasions, a conflict has arisen between the two principles, as when blacks have been given a preference in hiring in order to improve their social position. The group disadvantaging principle permits, and might even require such treatment for blacks. The antidiscrimination principle, with its commitment to color blindness, tends to make such treatment illegal.

These struggles over the meaning of equal protection have given our constitutional age its special character, and after having been immersed in them for a decade or two, it is not at all surprising that I see within the first amendment a similar intellectual process. Most agree that the first amendment seeks to further democracy by protecting collective self-determination in much the same way that racial equality is seen as the purpose of the fourteenth amendment, but we are once again divided over the mediating principle that gives fullest

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[6] *See* Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147 (1976).

expression to that ideal. Here the division is not between antidiscrimination and group disadvantaging, as it is in equal protection, but rather between autonomy and public debate. These two principles represent different ways of understanding and furthering the democratic purposes of the first amendment. The distinction between the autonomy principle and the public debate principle is, moreover, crucial for explaining why the state has a role to play in furthering free speech values.

Those who reduce the first amendment to a limit on state action tend to regard it as a protection of autonomy. The individual is allowed to say what he or she wishes, free from interference from the state. It is as though a zone of noninterference were placed around each individual, and the state (and the state alone) were prohibited from crossing the boundary. Even in this account, however, autonomy is not protected as an end in itself, nor as a means of individual self-actualization. Rather, it is seen as a way of furthering the larger political purposes attributed to the first amendment. It is assumed that the protection of autonomy will produce a debate on issues of public importance that is, to use Justice Brennan's now classic formula, "uninhibited, robust, and wide-open."[7] Of course, rich public debate will not itself ensure self-governance, because the electorate must still listen to what is said and act on the basis of what it learns, but free debate still remains an essential precondition for democratic government, and autonomy is seen as the method of bringing that debate into being.

Some may dispute this instrumental view of autonomy, but it is embraced by people as far apart on the political spectrum as Harry Kalven and Robert Bork and now dominates our thinking about the first amendment. It is rooted in the fact that the free speech guarantee appears as part of a legal instrument, the Constitution, which is for the most part concerned with establishing the structure of government. The instrumental theory also explains why speech, among the many ways of self-actualization, is singled out by the Constitution,[8] why the autonomy protected under the first amendment could belong to institutions (CBS or the NAACP) as well as to individuals, and why speech could be preferred even when it harms someone else and thus infringes on that person's efforts at self-actualization.[9] The linkage between autonomy and democracy also accounts for the favored position in first amendment jurisprudence of the rule against content regulation. The hope is that a rule denying the state power to silence speech on the basis of its content will produce the broadest possible debate.

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[7] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[8] *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971).

[9] *See* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 11–12 (1982).

In some social settings, the instrumental assumption underlying the protection of autonomy may be well founded. In a Jeffersonian democracy, for example, where the dominant social unit is the individual and power is distributed equally, autonomy might well enhance public debate and thus promote collective self-determination. But in modern society, characterized by grossly unequal distributions of power and a limited capacity of people to learn all that they must to function effectively as citizens, this assumption appears more problematic. Protecting autonomy by placing a zone of noninterference around the individual or certain institutions is likely to produce a public debate that is dominated, and thus constrained, by the same forces that dominate social structure, not a debate that is "uninhibited, robust, and wide-open."

The public debate principle, in contrast, acknowledges the problematic character of the instrumental assumption underlying the protection of autonomy and seeks to provide a foundation for the necessary corrective action. The purpose of the first amendment remains what it was under autonomy — to protect the ability of people, as a collectivity, to decide their own fate. Rich public debate also continues to appear as an essential precondition for the exercise of that sovereign prerogative. But now action is judged by its impact on public debate, a social state of affairs, rather than by whether it constrains or otherwise interferes with the autonomy of some individual or institution. The concern is not with the frustration of would-be speakers, but with the quality of public discourse. Autonomy may be protected, but only when it enriches public debate. It might well have to be sacrificed when, for example, the speech of some drowns out the voices of others or systematically distorts the public agenda.

Disfavoring state action is not the same as precluding such action altogether. Those who read the first amendment as a protection of autonomy are not necessarily committed to the absolutist position identified with Justice Black (who insisted that "no law" means "no law").[10] They sometimes allow the state to cross the boundary and interfere with autonomy in order to serve other social interests; speakers may, for example, be silenced to preserve public order or to protect interests in reputation. What the autonomy principle does, however, is to create a very strong presumption against state interference with speech. But under the public debate principle, there is no such presumption against the state. The state stands on equal footing with other institutions and is allowed, encouraged, and sometimes required to enact measures or issue decrees that enrich public debate, even if that action entails an interference with the speech of some and thus a denial of autonomy.

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[10] *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 717–18 (1971) (Black, J., concurring).

Of course, the state might act wrongfully, and thereby restrict or impoverish rather than enhance public debate. We must always stand on guard against this danger, but we should do so mindful of the fact that this same danger is presented by all social institutions, private or public, and that there is no reason for *presuming* that the state will be more likely to exercise its power to distort public debate than would any other institution. It has no special incentive to do so; government officials like to preserve their positions and the system that brought them to power, but the same can be said of the owners and managers of so-called private enterprises, who might well use their power to protect themselves and those government officials who serve their interests. Admittedly, the state does have some unique resources at its disposal, including a monopoly over the lawful means of violence, but once we cease to think of the state as a monolith (the Leviathian) and realize that it is a network of competing and overlapping agencies, one checking another, and all being checked by private institutions, that power will appear less remarkable and less fearsome. We will come to see that the state's monopoly over the lawful infliction of violence is not a true measure of its power and that the power of an agency, like the FCC, is no greater than that of CBS. Terror comes in many forms. The powers of the FCC and CBS differ, one regulates while the other edits, but there is no reason for believing that one kind of power will be more inhibiting or limiting of public debate than the other. The state, like any other institution, can act either as a friend or enemy of speech and, without falling back on the libertarian presumption, we must learn to recognize when it is acting in one capacity rather than another.

II.

Today, public debate is dominated by the television networks and a number of large newspapers and magazines. The competition among these institutions is far from perfect, and some might argue for state intervention on a theory of market failure. There is a great deal of force to those arguments, but they obscure a deeper truth — a market, even one that is working perfectly, is itself a structure of constraint. A fully competitive market might produce a diversity of programs, formats, and reportage, but, to borrow an image of Renata Adler's, it will be the diversity of "a pack going essentially in one direction."[11]

The market constrains the presentation of matters of public interest and importance in two ways. First, the market privileges select groups, by making programs, journals, and newspapers especially

[11] R. ADLER, RECKLESS DISREGARD 17 (1986).

responsive to their needs and desires. One such group consists of those who have the capital to acquire or own a television station, newspaper, or journal; another consists of those who control the advertising budgets of various businesses; and still another consists of those who are most able and most likely to respond enthusiastically to advertising. The number in the last group is no doubt quite large (it probably includes every nine-year-old who can bully his or her parents into purchasing one thing or another), but it is not coextensive with the electorate. To be a consumer, even a sovereign one, is not to be a citizen.

Second, the market brings to bear on editorial and programming decisions factors that might have a great deal to do with profitability or allocative efficiency (to look at matters from a societal point of view) but little to do with the democratic needs of the electorate. For a businessman, the costs of production and the revenue likely to be generated are highly pertinent factors in determining what shows to run and when, or what to feature in a newspaper; a perfectly competitive market will produce shows or publications whose marginal cost equals marginal revenue. Reruns of *I Love Lucy* are profitable and an efficient use of resources. So is MTV. But there is no necessary, or even probabilistic, relationship between making a profit (or allocating resources efficiently) and supplying the electorate with the information they need to make free and intelligent choices about government policy, the structure of government, or the nature of society. This point was well understood when we freed our educational systems and our universities from the grasp of the market, and it applies with equal force to the media.

None of this is meant to denigrate the market. It is only to recognize its limitations. The issue is not market failure but market reach. The market might be splendid for some purposes but not for others. It might be an effective institution for producing cheap and varied consumer goods and for providing essential services (including entertainment) but not for producing the kind of debate that constantly renews the capacity of a people for self-determination. The state is to act as the much-needed countervailing power, to counteract the skew of public debate attributable to the market and thus preserve the essential conditions of democracy. The purpose of the state is not to supplant the market (as it would under a socialist theory), nor to perfect the market (as it would under a theory of market failure), but rather to supplement it. The state is to act as the corrective *for* the market. The state must put on the agenda issues that are systematically ignored and slighted and allow us to hear voices and viewpoints that would otherwise be silenced or muffled.

To turn to the state for these reasons does not presuppose that the people who staff a government agency are different in moral quality or in personality from those who control or manage the so-called

private media. The state has no corner on virtue. What the theory of countervailing power does presuppose, however, is that simply by virtue of their position government employees are subject to a different set of constraints than those who run the media. They are public officials. We know that sometimes the word "public" becomes hollow and empty, a mere cover for the advancement of private interests, and that systems of public accountability are not perfect. But that is not to deny the force of these systems of accountability altogether. They may be imperfect but nonetheless of some effect. There is also an important difference of aspiration. It is one thing to empower someone called a public official and to worry whether the power entrusted is being used for public ends; it is another thing simply to leave that power in the hands of those who openly and unabashedly serve institutions that rest on private capital and are subject to market pressures.

In recent years there has been increasing talk among journalists about professionalism, and it has been suggested that a new professional ethos exists today that will temper the influence of the market on journalists, editors, and program managers and strengthen their democratic resolve. Such a development is, of course, salutary, but it does not render state intervention unnecessary. Indeed, the growth of professional norms emphasizing the democratic rather than economic mission of the media might well be in part traced to various state interventions, such as the fairness doctrine. And, whatever the cause, the fact remains that these norms must be continuously reinforced by state intervention or other forms of institutionalized power if they are to be capable of resisting the pressures of the marketplace. As we know from *Brown v. Board of Education*[12] and the civil rights movement of the sixties, exemplary "folkways" can sometimes be nourished, and maybe even created or legitimated, by strong exercises of state power.

Drawing on the power of taxation and its organizational advantages, the state can discharge its corrective function through the provision of subsidies. Examples of this form of state intervention include aid to public libraries, public schools, private and state universities, public broadcasting, and presidential candidates. These subsidies make an enormous contribution to public discourse and further first amendment values, although we would never know it from a reading of the first amendment that emphasizes the protection of autonomy. Autonomy is not a bar to such state activities, but it does produce a constitutional indifference, leaving these activities to suffer the vicissitudes of a politics itself dominated by the market. Under the public debate principle such action is favored and, when inaction becomes a

[12] 347 U.S. 483 (1954); 349 U.S. 294 (1955).

form of action, it may also be required, although the remedial problems of implementing such an affirmative duty are acute and well known.[13] With respect to the other form of state intervention — state action of a regulatory or prohibitory nature — the autonomy principle does have strong legal implications, and some of those are most unfortunate. The strong presumption against the state rooted in the autonomy principle has, for example, resulted in the invalidation of laws imposing ceilings on political expenditures. It has also placed a constitutional cloud over the fairness doctrine, precluding the extension of that doctrine to the print media, enfeebling its enforcement, and putting its very existence in question. Autonomy provides the proponents of deregulation with a constitutional platform that is ill-deserved.

III.

The right now dominates American politics, and it is the right that has commandeered the assault on the activist state. By "the right" I mean those who are prepared to accept as just or even natural the distribution of wealth and power produced by the market, and who seek to curb the state because of its reconstructive capacity and propensity. There are others, however, who are critical of the present distribution of wealth and power, but who are also wary of the state, particularly the one headquartered in Washington. They, too, have denounced the activist state and in its place urge not a return to the market, but a program of "left decentralization."

A century ago, such a program was advanced by the populists, at least until they became absorbed into the mainstream and buckled under the organizational imperatives of the Democratic Party.[14] In the 1960s, the program of left decentralization played an important role in the life of SNCC and SDS. Today, it is put forward by a group of academics located in (of all places) the law schools: the critical legal studies movement. Their critique of the activist state is not backed by even a modicum of political power (to put the point most generously), but I nonetheless feel compelled to respond, because it has captured the imagination of so many people I respect and admire, especially my students, and because it builds on the premises that justify state intervention in the first place — a rejection of autonomy, an acceptance of the public debate principle, and an acknowledgement of the distorting influence of the market on democratic politics.

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[13] *See, e.g.*, Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1297 (1984).

[14] *See* L. GOODWYN, DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA (1976).

We began, you will recall, with the claim that left to itself public debate will not be "uninhibited, robust, and wide open," but instead will be skewed by the forces that dominate society. The state should be allowed to intervene, and sometimes even required to do so, I argued, to correct for the market. In saying this, I assumed that the state would act as a countervailing power, but there is a danger, so the leftist critic insists, that it will not act in this way but will instead become the victim of the same forces that dominate public debate. There is a risk that the state will reinforce rather than counteract the skew of the market, because it is as much an object of social forces as it is an agent of change. The state might do some good, but the prospect of it doing so is so slim, and the danger of it doing just the opposite is so great, that it would be best, the leftist critic concludes, to bar state intervention altogether or at least to create a strong presumption against it — not to secure autonomy, but to insure the richness of public debate.

In the late 1970s, Charles Lindblom published an important book, *Politics and Markets*, which described with great force and clarity the so-called danger of "circularity."[15] The state was supposed to govern business, but there was good reason to believe that the system of control largely worked the other way around. The picture that Lindblom painted was a sobering one — the danger of circularity is indeed real — but my own view of the facts and, more particularly, of our historical experience with the activist state in the sixties leads me to believe that the elements of independence possessed by the state are real and substantial. This independence is not complete, but it is nonetheless sufficient to make the theory of countervailing power viable. I also believe that we might cope with the danger of circularity in ways other than creating the strong presumption against state action urged by the leftist critic. To begin with, we might recognize that some state agencies are more independent of market forces than others and accordingly allocate more power to them.

In the past, first amendment jurisprudence has allowed the courts to play an important role in evaluating the intervention of various political agencies, in order to avoid the tyranny of the majority. I would continue that tradition, but now as a way of gaining some measure of protection against circularity. The courts are part of the state and obviously are not wholly independent from the same forces that dominate social structure, but they are likely to achieve a greater measure of independence than the legislature or administrative agencies. As we saw in the early New Deal, sometimes the courts achieve too much independence from social pressures. This independence

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[15] *See* C.E. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS 201–21 (1977).

stems from the fact that judges have long and sometimes even life tenure; they are subject to well-established professional norms that require them to respond to grievances they might prefer to ignore; and they must justify their decisions publicly on the basis of principle.

The danger of circularity also might be reduced by changes in the design of particular institutions. The aim is not to free the various agencies of the state from the forces that dominate social structure (surely an impossible task), but only to make it more likely that they will exert a countervailing force. This goal might be achieved by creating within state agencies certain processes or mechanisms that would enhance the power of the weaker elements in society (for example, creating in administrative agencies offices of public advocacy) and that would lessen the power of those who already dominate the social structure (for example, establishing open-hearing requirements). In this way, Naderism might have a first amendment basis, because in fighting "agency capture," we might be increasing the independence of the state from the market and thus enhancing its capacity to correct for the constraints that social structure imposes on public debate. Such reform measures need not, of course, be confined to administrative agencies; they can extend to all agencies of the state, including the courts.

None of these ameliorative measures will eliminate the danger of circularity altogether. We should recognize their incompleteness and be cautious. But to do more, as the leftist critic insists, and to join in the attack on the activist state that is so fashionable today, would expose us to an even greater danger: politics dominated by the market. We are left without a remedy. Circularity is typically raised as an objection to regulatory action by the state, when, for example, a prohibition backed by criminal sanctions is enforced against an individual or some institutional speaker. It is hard to understand, however, why the same objection does not extend to the subsidy programs of the state as well. Some may favor those programs over regulatory measures on the theory that they do not violate autonomy, but since rich public debate rather than autonomy is for me and the leftist critic the key first amendment value, it is hard to transform that preference into a constitutional rule. Under the public debate principle, the fairness doctrine and public television stand on the same constitutional plane: if one fails because of circularity, so must the other.

Overwhelmed by the fear of circularity, all forms of state intervention would have to go, but the left is not without hope. They have a remedy of a different kind. They might turn their backs on the regulatory measures of the activist state and even denounce state subsidies, but they too are determined to free democracy from the grasp of market forces and, in that spirit, celebrate self-organization and modes of expression such as picketing and parading. Such activities, of course, have an important role to play in any account of the

first amendment and indeed are essential for a true and effective democracy. The civil rights marches of the sixties, the protests against the Vietnam War, the shanties that have recently been raised on our campuses, and the historic movement in Poland known as Solidarity bear ample and glorious witness to this fact. The issue is not, however, whether self-organization and demonstration are necessary, but whether they are sufficient, at least to the point of justifying the attack on the activist state. This they surely are not. These activities are an important part of any first amendment theory, but not adequate substitutes for the fairness doctrine, public television, restrictions on political expenditures, or other forms of state regulation or state subsidization aimed at enhancing the quality of public discourse.

In assessing the affirmative program of the left, one should begin with the simple observation that the expressive activities that they favor do not eliminate the problem of circularity altogether. The state is often needed to legitimate and protect those activities, and there is no reason to be more suspicious of the state when it, for example, grants subsidies or regulates the media than when it regulates access to the shopping centers, silences hecklers, or legitimates and protects union activity.[16] Moreover, to rely exclusively, or even primarily, on parading or picketing (referred to by one of my colleagues, not a radical, as "cheap speech") would leave to the less powerful elements in society only the least effective modes of expression. Compare one day's work of distributing pamphlets at a local shopping center with a thirty second editorial advertisement of the kind sought in *Columbia Broadcasting System v. Democratic National Committee*.[17] Effective speech in the modern age is not cheap.

Things needn't be so. I can imagine a social setting in which the expressive activities celebrated by the left would be sufficient. They might work in the polis of ancient Greece or in an America divided, as Jefferson proposed, into a multitude of little wards.[18] Then we would have a social decentralization and a setting in which parading or picketing could make an effective contribution toward both informing and educating the public and developing the talents and fixing the character and identity of those individuals who take part in these activities. The attack on the activist state and the emphasis on cheap speech would not then be based just on a fear, the danger of circularity, but could also make plausible claim to a theory of participatory democracy. Such a theory would give the first amendment program of the left its greatest appeal but, alas, it rests on an impossible dream.

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[16] *See* Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978).

[17] 412 U.S. 94 (1973).

[18] *See* Letter to Samuel Kercheval (Sept. 5, 1816), *reprinted in* THE POLITICAL WRITINGS OF THOMAS JEFFERSON 97–98 (E. Dumbauld ed. 1955).

It entails a division and reorganization of American society that is unlikely ever to materialize. It presupposes a localism that is barely imaginable.

The left is wary of the activist state, and may have good reasons for that wariness, but in resurrecting the presumption against the state, they offer no plausible alternative to a politics dominated by the market. They emphasize self-organization and direct action like parading and picketing, in contrast to state regulation or subsidization, but under the forms of social life we know, or are ever likely to know, those forms of expression will be insufficient. Something would be missing. The citizen would not be a consumer, true, but I am afraid that he or she would be little more than an athlete (or to use Arendt's metaphor, a flute player).[19] Politics would become a species of performance. Those who happened to be engaged in the demonstration would be ennobled and would feel the special pleasures of struggle and contest, but for the most part the public — the voters — would sit by, unengaged and unmoved by the spectacle, anxious to get on with the business of the day.

In another world things might be different, but in this one, we will need the state. In eschewing the tired and familiar presumption against the state, we risk circularity, and a number of other dangers, but only to save our democracy. We turn to the state because it is the most public of all our institutions and because only it has the power we need to resist the pressures of the market and thus to enlarge and invigorate our politics.

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[19] *See* H. ARENDT, *What is Freedom?*, in BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 143, 153 (enlarged ed. 1968). *See generally* H. ARENDT, THE HUMAN CONDITION (1959); H. ARENDT, ON REVOLUTION (1963).